1-26-1976

George Bernard Eberhardt v. Commonwealth of Kentucky

Appellant's Brief 1975-SC-1120

APPELLANT'S BRIEF

3766

IN THE

SUPREME COURT OF KENTUCKY

NO. 75 - 1120

GEORGE BERNARD EBERHARDT — APPELLANT

V

BRIEF OF APPELLANT

COMMONWEALTH OF KENTUCKY — APPELLEE

Appeal from the Jefferson Circuit Court
Criminal Branch, Second Division
John P. Hayes, Judge

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This is to certify that a copy of this brief has been served on:
Hon. John P. Hayes, Judge
Hon. Robert Stephens, Attorney General
Hon. Dave Armstrong, Commonwealth Attorney
pursuant to RCr 1.250.

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STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERRONEOUSLY PERMIT THE PROSECUTOR TO REFER TO MUG SHOTS OF THE APPELLANT, THUS BURDENING HIM WITH A BADGE OF CRIMINALITY WHICH VITIATED THE CONSTITUTIONAL PRESUMPTION OF INNOCENCE?

II. DID THE REFUSAL OF THE TRIAL COURT TO CONDUCT A SUPPRESSION HEARING TO REVIEW THE PROCEDURES BY WHICH THE APPELLANT WAS IDENTIFIED DEPRIVE HIM OF A FAIR TRIAL?

III. DID THE TRIAL COURT ERRONEOUSLY ADMIT A PRIOR WRITTEN STATEMENT OF A PROSECUTION WITNESS INTO EVIDENCE AND THUS DENY THE APPELLANT A FAIR TRIAL?

IV. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN ALLOWING THE COMMONWEALTH TO SUGGEST THAT A KEY DEFENSE WITNESS WAS PAID FOR HIS TESTIMONY AND THUS DENY HIM A FAIR TRIAL?

V. DID THE REFUSAL OF THE TRIAL COURT TO GIVE A REQUESTED CAUTIONARY INSTRUCTION ON EYEWITNESS IDENTIFICATION DEPRIVE THE APPELLANT OF A FAIR TRIAL?

VI. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR BY NOT DECLARING A MISTRIAL AFTER THE PROSECUTION'S COMMENT ON THE APPELLANT'S FAILURE TO TESTIFY?

VII. DID THE CUMULATIVE EFFECT OF THE MANY ERRORS AT TRIAL DENY THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

STATEMENT OF THE CASE

A. STATEMENT OF THE NATURE OF THE PROCEEDINGS

The appellant, George Bernard Eberhardt, was indicted by the Jefferson County Grand Jury on January 23, 1975, and charged with one count of armed robbery (TR 102). On March 26, 1975, the appellant waived arraignment and pleaded not guilty to the charge (TR 3). On September 29 and 30, 1975, the case was tried before a jury, and the jury returned a verdict of guilty and recommended a sentence of ten (10) years in the penitentiary (TR 14,16-18). The appellant, by counsel, filed a written motion for a new trial on October 6, 1975 (TR 18). On October 17, 1975, the motion was overruled and judgment was entered in accordance with the verdict (TR 19-20). On October 17, 1975, the appellant filed his notice of appeal and a motion to proceed in forma pauperis, which was sutained (TR 20-21). The record on appeal and a statement of appeal were both subsequently timely filed with this court.

B. STATEMENT OF THE FACTS

On or about October 7, 1974, an armed robbery occurred at the Save-A-Step Food Market, 1600 Arcade, Louisville, Kentucky (TE 16-17). On October 13, 1974, Detective Richard Grote, of the Louisville Police Department, interviewed Rick Hancock and Kenneth Morrow, the victims of the armed robbery, and in the course of that interview, showed them twenty-nine (29) photographs taken from the Louisville Police Department's mug shot files (TE 67-68). After viewing the spread of mug shots presented to them, Hancock and Morrow identified George B. Eberhardt as one of the men who allegedly participated in the robbery.

At a pre-trial hearing in chambers, counsel for the appellant made a motion in limine to prohibit reference to or introduction of the police mug shots of the appellant in order

to avoid undue prejudical effect upon the jury (TE 3). This motion was overruled. At the same time, however, a motion to prohibit any mention of the appellant's prior arrest record was sustained (TE 4).

Counsel for the appellant further moved to exclude any in-court identification of the appellant, based on the possibility of suggestive pre-trial procedure used by the police in identifying the appellant (TE 6). After a brief discussion with the prosecutor, the trial court overruled appellant's motion without granting a hearing (TE 7).

During the course of the Commonwealth's opening statement, the prosecutor, Charles Ricketts, made numerous and repeated references to these photographs and discussed in detail how the police procured the mug shots for the subsequent identification by Hancock and Morrow (TE 10-11). Again, during the direct examination of Hancock and Morrow, the Commonwealth made reference to these mug shots (TE 35-36, 42, 49-50, 67). Over objection of counsel for the appellant, these mug shots were introduced into evidence (TE 68-70).

While presenting its case-in-chief, the Commonwealth called to the stand Phillip Dale Banks (TE 50-59). Banks, an inmate at the Kentucky State Reformatory at LaGrange, is serving a sentence received for his part in the Save-A-Step robbery (TE 51). During his direct examination of Banks, the Commonwealth's Attorney attempted to insinuate that the appellant and Banks shared a "common habit" of drug addiction (TE 53). Counsel for the appellant made timely objection to the Commonwealth's tactic, which was sustained (TE 54).

In an attempt to impeach Banks, the Commonwealth introduced a prior inconsistent statement which Banks had made. Over the objection of counsel for the appellant, the statement was introduced into evidence (TE 57-58).

During the case-in-chief for the defense, the appellant called Carl Willis, an alibi witness (TE 94-123). Willis testified

that on October 7, 1974, he and the appellant, along with three (3) other men, were returning from a short trip to Cleveland, Ohio (TE 96). On cross-examination, Mr. Ricketts, Assistant Commonwealth's Attorney, improperly attacked the credibility of the witness and the integrity of defense counsel by implying that Willis had been paid to provide favorable testimony (TE 119). Defense counsel promptly moved for a mistrial and was overruled (TE 119-120). This highly improper and unfounded attack was repeated during the closing argument of the Commonwealth. Objection was again timely made and again the objection and motion for a mistrial was overruled (TE 160-161).

The attack on the integrity of counsel for the appellant was only one of a series of improper comments and arguments made during the closing argument for the Commonwealth. Mr. Ricketts also suggested that the appellant should be punished because he exercised his constitutional right to a trial and refused to plead guilty (TE 156-158). Mr. Ricketts also intimated that his own witness, Phillip Dale Banks, might have been motivated by some sort of payment to testify on behalf of the appellant (TE 158).

The appellant, on advise of counsel, chose to exercise his constitutional right to remain silent during the trial of the action, and did not take the witness stand. Duirng the closing argument for the Commonwealth, Mr. Ricketts gestured toward the appellant at counsel table and stated: "Who else could have testified in this case?" (TE 162). Timely objection was made and sustained, but defense counsel's motion for a mistrial was overruled.

I. THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTOR TO REFER TO MUG SHOTS OF THE APPELLANT, THUS BURDENING HIM WITH A BADGE OF CRIMINALITY WHICH VITIATED THE CONSTITUTIONAL PRESUMPTION OF INNOCENCE.

The criminal past of a defendant on trial may not normally be considered by the jury in determining his guilt or innocence. See Marshall v. Commonwealth, Ky., 482 S.W. 2d 765 (1972). For this reason, a jury should only be exposed to evidence of past criminality for a specific purpose in carefully limited circumstances. Thus, the introduction of a photograph showing the accused with a police identification number has been limited. Matters v. Commonwealth, Ky., 245 S.W. 2d 913 (1952). Similarly, the introduction of prior felony convictions has been carefully limited in this Commonwealth. See Bell v. Commonwealth, Ky. 520 S.W. 2d 316 (1975); Blair v. Commonwealth, Ky. 458 S.W. 2d 761 (1970); Cotton v. Commonwealth, Ky., 454 S.W. 2d 698 (1970).

Other jurisdictions have had occasion to restrict the trial of an accused in prison clothing for the same reasons. See Thompson v. State, 514 S.W. 2d 275 (Tex. Cr. App. 1974); Hernandez v. Beto, 443 F. 2d 634, (5th Cir. 1971), cert. den. 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed. 2d 174 (1971); Eaddy v. People, 115 Colo. 448, 174 P. 2d 717 (1946).

The common thread running through all of these cases is the concern of the courts that an accused may be convicted as a result of his past criminality rather than on the basis of evidence of his guilt of the crime charged. As the court said in Eaddy, supra, at 718:

> The presumption of innocence requires the garb of innocence and regardless of the outcome, or of the evidence awaiting prepresentation, every defendant is entitled to be brought before the court with the appearance..... of a free and innocent man.....

Clearly, the exposure of the jury to the criminal past of an accused through references to mug shots is as damaging as his appearance in prison clothing. Either method displays to the jury a badge of criminality which is inconsistent with the presumption of innocence.

In the case at bar, counsel for the appellant unsuccessfully sought to prohibit the introduction of mug shots or any reference to them during the trial (TE 3-4). The prosecutor then gratuitously proceeded to refer to the photographs in question as "mug shots" throughout the trial (TE 10-11, 43, 66-67). This reference was in no way necessary to the establishment of any legitimate point in his case. Rather, it appears to have been a deliberate effort by the prosecutor to interject the appellant's badge of criminality into the trial to bolster the chances for a conviction.

In Matters, supra, the introduction of the photograph with the police identification number served a legitimate prosecutorial purpose of proving the name in which the defendant was identified. The disclosure of the number to the jury was thus inevitable. Nevertheless, the court held that its introduction without a cautionary instruction, coupled with improper references by the prosecutor in closing argument to the criminal past of the defendant, created a sufficient danger of prejudice to require a new trial.

In the case at bar, the repeated gratuitous references by the prosecutor, with the prior approval of the court, clearly require the same result.

The failure of the trial court to follow established guidelines to minimize the risk of conviction based on a badge of criminality is inconsistent with the appellant's right to a fair trial, and a new trial is thus required.

See Burnett v. Commonwealth, Ky., 523 S.W. 2d 229 (1975); Evans v. Cowan, 506 F. 2d 1248 (6th Cir. 1974). Any other result would make a mockery of the constitutionally protected presumption of innocence. See Eaddy v. People, supra.

II. THE REFUSAL OF THE TRIAL COURT TO CONDUCT A SUPPRESSION HEARING TO REVIEW THE PROCEDURES BY WHICH THE APPELLANT WAS IDENTIFIED DEPRIVED HIM OF A FAIR TRIAL.

In an in chambers hearing, before the selection of the jury, the appellant's counsel made a motion to exclude any in court identification of the appellant based on possible suggestive pretrial procedures used by the police in identifying the appellant (TE 6). After a brief discussion with the prosecutor, the trial court overruled the motion for a suppression hearing (TE 7).

It is manifest that the trial court's determination to overrule the motion was not factually based. Furthermore, this court has consistently and unequivocally required the use of suppression hearings in certain areas of the criminal law. In Britt v. Commonwealth, Ky., 512 S.W.2d 496 (1974), where a confession to a voluntary manslaughter charge was challenged, the court granted a motion for an in-chambers hearing to determine voluntariness of the confession. Speaking of the procedure for such a hearing the court said:

> On a motion to suppress, the trial court must conduct an evidentiary hearing in chambers. Only if he is satisfied from substantial evidence that the confession was voluntary (and is not otherwise inadmissible) can it then be heard and considered by the jury. Constitutionally, this is all that is required, and if the trial court's determination is supported by substantial evidence it would be conclusive, cf. Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). (Emphasis added)

The court again discussed the issue of procedures to be followed when evidence is challenged for taint in Myers v. Commonwealth, Ky., 499 S.W.2d 277 (1973). In Myers a hearing was held,

and the court clearly stated that many circumstances must be considered at the hearing. Undoubtedly then, upon a motion to suppress a possibly tainted identification, a defendant is entitled to a hearing on the merits of his motion. That right was denied to the appellant. In the absence of a suppression hearing, clearly the defense counsel had no opportunity to develop any possibility of taint. Consequently, the denial of the hearing must be considered to be prejudicial error. As this court noted in Kelley v. Commonwealth, Ky., 474 S.W.2d 63 (1971), a suppression hearing is constitutionally required by United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

The reasoning in Wade was clearly stated when the court said:

> When a hearing is not held the State may then rest upon the witnesses' unequivocal courtroom identification and not mention the pretrial identification as part of the State's case at trial. Counsel is then in a predicament in which Wade's counsel found himself - - realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification and having to probe in the dark in an attempt to discover and reveal the unfairness, while bolstering the government witnesses' courtroom identification by bringing out and dwelling upon his prior identification 388 U.S. 218, at 240, 87 S.Ct. 1926 at 1939.

Thus by denying appellant's motion, the trial court placed him in precisely the situation contemplated by Wade, in that his only means of demonstrating taint was through a blind cross-examination. Only by cross-examination could the appellant explore the credibility of the in-court identification; without cross-examination, the most effective tool of the appellant was blunted and the jury's only means of getting a true picture of the identification was denied.

Clearly then the denial of the hearing deprived the appellant of a fair trial in accordance with due process of law.

III. THE TRIAL COURT ERRONEOUSLY ADMITTED A PRIOR WRITTEN STATEMENT OF A PROSECUTION WITNESS INTO EVIDENCE AND THUS DENIED THE APPELLANT A FAIR TRIAL.

The introduction of tangible forms of prior statements of trial witnesses has been repeatedly condemned in this Commonwealth. In Meadors v. Commonwealth, 281 Ky. 622, 136 S.W.2d 1066 (1940), the court provided definite guidelines for impeaching a witness by prior testimony and held: "In any instance, the scope and extent of the use of the transcript and presentation of portions of its contents should be limited . . . ." Again in Tarrance v. Commonwealth, Ky., 521 S.W.2d 521 (1975) the court said at page 523: "It is well settled that where a party puts in evidence part of a written statement, the other party may introduce only such of the remainder as is concerned with the particular subject under inquiry." See also Hodge v. Commonwealth, Ky., 287 S.W.2d 426 (1956) and White v. Commonwealth, 292 Ky. 416, 166 S.W.2d 873 (1942).

The reasons for limiting the introduction of a tangible statement are strong and compelling. In the first place, the statement may contain prejudicial collateral matters which should not be interjected into the trial. Secondly, there is a serious risk that a jury might give the tangible unsworn account of the facts much more weight than the actual trial testimony of the witness. This danger is especially grave in light of the fact that the prior statement may properly be regarded by the jury as substantive evidence. See Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969).

In the case at bar, the witness whose statement was introduced was Phillip Banks, who already stood convicted of the crime for which the appellant was on trial. Banks was called by the Commonwealth, but he did not provide the testimony against the appellant which the prosecutor required. The prosecutor was then permitted over objection to contradict Banks by his prior written statement (TE 55-58). Having done so,

the prosecutor was then permitted to introduce the actual statement into evidence (TE 58).

A review of the statement in question and the impact of its introduction in the case at bar demonstrates the wisdom of the established rule requiring its exclusion. The statement contained irrelevant and inflammatory details of Banks' involvement in the crime. More important, the written statement implicated the appellant more persuasively than the trial testimony about him. Long after Banks had left the stand, with his renunciation of portions of the statement fading in the minds of the jurors, the physical statement itself remained with the jury as a tangible reminder of the most damaging features of his testimony. Indeed, the tangible statement may well have become a substitute for his actual testimony and may have influenced the jury during its deliberations.

The statement should not have been introduced under established state law. Its introduction caused a substantial impairment of the appellant's right to effective confrontation of the evidence against him. The appellant was thus denied a fair trial consonant with due process of law by its admission. For this reason, he must be granted a new trial.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING THE COMMONWEALTH TO SUGGEST THAT A KEY DEFENSE WITNESS WAS PAID FOR HIS TESTIMONY AND THUS DENIED HIM A FAIR TRIAL.

On two (2) separate occasions, the Commonwealth suggested that Carl Willis, a defense witness, was being paid for his testimony (TE 119, 160-161). The trial court, indeed recognized this impropriety the first time and sustained the appellant's objection (TE 119). Yet, during closing argument the prosecutor was allowed to raise this matter again, and this time the appellant's objection was overruled (TE 160-161). This reverse in position by the trial court was left unexplained by the record, but its impact was clear and the effect was to deny the appellant a fair trial.

Such argument by the prosecution can only be viewed as an attack on both the counsel for the appellant and the witness, Mr. Willis. Attacks of both types have been held by this court to be highly improper forms of argument. In Whitaker v. Commonwealth, 298 Ky., 442, 183 S.W. 2d 183 (1944) the prosecutor had made an unwarranted attack upon counsel for the defendant by charging without any support in the evidence that the accused's defense had been "fixed." The court in its decision pointed out that while a prosecutor is allowed much latitude in argument, and while he may deduce conclusions from the evidence, he must stay within the record and avoid abuse of defendants and their counsel. Certainly, in the case at bar a suggestion that Mr. Willis was paid by the appellant for favorable testimony - that the defense is "fixed" - is precisely the sort of argument prohibited by the court in Whitaker, supra.

Again in Woodford v. Commonwealth, Ky., 376 S.W.2d 526 (1964) the court held that counsel may discuss the facts proved and draw reasonable deductions therefrom during his argument to the jury, but that an attack on the witnesses' credibility must be based on facts appearing in evidence. See also Barnett v. Commonwealth, Ky., 403 S.W.2d 40 (1966).

As the record reflects no facts to support the comments and suggestions made by the Commonwealth, the trial court erred in allowing them, and thus denied appellant constitutional right to a fair trial.

V. THE REFUSAL OF THE TRIAL COURT TO GIVE A REQUESTED CAUTIONARY INSTRUCTION ON EYEWITNESS IDENTIFICATION DEPRIVED THE APPELLANT OF A FAIR TRIAL.

At the close of the evidence, the appellant, by counsel, tendered several instructions, one of them concerning eyewitness identification. This particular instruction is set out in full as follows:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Commonwealth has the burden of

providing (proving) identity beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were the lighting conditions, whether the witness had occasion to see or know the person in the past.

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification. You may also take into consideration that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant with others who bear no resemblance to him.

(3) You may take into account any where the witness made an identification which was inconsistent with his identification at trial.

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness: consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden

> of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

The motion to include this instruction was overruled. (TE 135).

The United States Supreme Court stated in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967): "The vagaries of eye-witness identification are well known: the annals of criminal law are ripe with instances of mistaken identification." And so the instruction tendered by the appellant was necessary and proper to insure that the jury was aware of the uncertainty of seemingly firm identification and to insure the misidentifications discussed in Wade, supra, can be avoided.

Several cases have expressly recognized the propriety and necessity of giving instructions on eyewitness identification. In Jones v. United States, 361 F.2d 537 (D.C. Cir., 1966), it was held that if the defendant has placed the prosecutor's identification of him in question and has asked for special instruction on the identification of him, and has asked for special instructions on the identification by witnesses, the court should give such an instruction adapted to the evidence. See also United States v. Levi, 405 F. 2d 380 (4th Cir., 1968). But, perhaps the best statement on this requested instruction was found in Macklin v. United States, 409 F.2d 174 (D.C. Cir., 1969), where the Court of Appeals of the District of Columbia said,

> We think that now, after the Supreme Court has focused on identification problems in its 1967 Wade-Gilbert-Stovall trilogy, it is even imperative that trial courts include, as a matter of routine, an identification instruction. In cases where identification is a major issue the judge should not rely on defense counsel to request so important a charge.

As the courts which have adopted this type of cautionary instruction have recognized, the danger of a conviction based upon mistaken identification is great. Indeed, suppression of any subsequent identification based on tainted or unfair identification procedures has been recognized to be an essential element of the constitutional right to a fair trial. See United States v. Wade, supra. The submission to the jury of the contested identification

without adequate safeguards in the case at bar deprived the appellant of his constitutional right to a fair trial in accordance with the due process of law.

VI. THE TRIAL COURT COMMITTED PREJUDICAL ERROR BY NOT DECLARING A MISTRIAL AFTER THE PROSECUTION'S COMMENT ON THE APPELLANT'S FAILURE TO TESTIFY.

Section 11 of the Kentucky Constitution and the Fifth Amendment to the United States Constitution expressly state that a defendant in a criminal case shall not be compelled to testify against himself. Further, the Kentucky Revised Statutes state clearly:

> In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him. KRS 421.225. (Emphasis added).

In spite of these proscriptions, the Commonwealth made direct reference to the appellant's failure to testify during its closing argument, thus denying the appellant a fair trial (TE 162). Appellant moved for a mistrial due to this highly improper comment by the prosecution and was overruled (TE 169). Yet, this court has recognized and ruled on this very form of argument by the Commonwealth. In Green v. Commonwealth, 488 S.W.2d 339 (1972) this court said that the statutory provisions that the accused's failure to testify in his own behalf shall not be commented upon: prohibiting any comment by the prosecution, the trial court, or anyone else.

The United States Supreme Court has also spoken on such action by the prosecution. That court said sufficiently in Stewart v. United States, 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84 (1961), "No comment or argument about a defendant's failure to take the stand is permissible." Also in Griffin v. California, 380, U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, rehearing denied 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965), the court stated clearly that a judge's or prosecutor's comment on defendant's failure to testify is reversible error. Therefore, by failing to observe the

clear statutory language of KRS 421.225 and the unequivocal meaning of the foregoing cases, the trial court erred in not granting a mistrial, thus denying the appellant a fair and impartial trial as demanded by due process of law.

VII. THE CUMULATIVE EFFECT OF THE MANY ERRORS AT TRIAL DENIED THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

From outset to conclusion, the trial was conducted in a manner which was calculated to produce a verdict of guilty based on repeated improper and extraneous matters. In what appears to have been a carefully planned attempt to convict the appellant on past criminal activity, the prosecution repeatedly made response to the police "mug shots: of him (TE 10-11, 43, 66-67). This served no legitimate purpose, and could only have been an attempt to secure a conviction at any cost. See Argument I

By use of an inconsistent statement, Mr. Banks, a Commonwealth witness, - was successfully impeached. Afterwards, the prosecution was permitted, over objection, to introduce the actual statement into evidence (TE 58). Such action was highly prejudicial, contrary to the established state law concerning such statements, and a clear denial of the appellant's right to confront the evidence against him. See Argument III

The prosecution, during direct examination of a Mr. Banks suggested that he and the appellant were on drugs ("Isn't there a common habit that you shared with him for some time . . . Have you ever used drugs?" TE 53-54). Such testimony was elicited only to inflame the jury against the appellant, and was obtained and introduced in such a manner as to deny the appellant a fair trial.

On two separate occasions, the prosecutor suggested by a defense witness had been paid to testify, thus engaging once again in highly improper argument (TE 119, 161). See Argument IV

The pattern of trial by emotional appeal and improper suggestion continued as the Commonwealth presented its closing argument to the jury. A clear attempt was made to prejudice the

jury against the appellant and have them return a guilty verdict simply because the appellant chose to demand a jury trial, to exercise rights guaranteed him by the United States and Kentucky Constitution (TE 156-158). In clear violation of the law established by this court, the prosecutor made direct reference to the appellant's failure to testify (TE 162,169). This served only to compound the prejudice against the appellant which had been cultivated throughout trial. See Argument VI. In an appeal to the fears of the jury the prosecutor urged conviction for self-preservation (TE 168), clearly improper under the law as established by this court.

All this occurred in a trial in which eyewitness identification was a prominent issue, a trial in which the recognized procedures for challenging such identification were not followed. From beginning to end, many safeguards to insure a fair trial were overlooked. Certainly, many of the errors enumerated here, and else where, are sufficient for a reversal of the trial court's verdict on their own. Combined, they form an insurmountable obstacle to a fair trial: Their cumulative effect was to frustrate efforts to present the appellant's case protected by his constitutional right to a presumption of innocence, and the prejudicial effect of such cumulative error has long been recognized by the Kentucky Court of Appeals. See Little v. Commonwealth, 221 Ky. 696, 299 S.W. 563 (1927). For this reason the judgment of the trial court must be reversed, and a new trial granted.

CONCLUSION

Because of the errors committed at trial, the appellant respectfully requests this court to reverse the conviction of the court below and to grant him a new trial.

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